alleging that the legislature's attempt to limit the ways in which they could gather the signatures necessary for their issue to be placed on the ballot was unconstitutional. The Court struck down Colorado's restrictions, stating that, "[h]aving decided to confer the right [of initiative], the State [is] obligated to do so in a manner consistent with the Constitution." *Id.* at 420. Indeed, this Court explained in *Meyer* that "the importance of the First Amendment's protections is at its zenith" where a government attempts to interfere with speech related to ballot initiatives. *See id.* at 425. (Imposing upon Colorado's initiative-related restrictions a burden of scrutiny that was "well-nigh insurmountable.")

It is also worth noting that the petition restrictions involved in *Meyer* were struck down even though those restrictions did not prohibit the people from discussing and adopting any particular amendments based on their subject matter. The *Meyer* Court found strict scrutiny to be justified even where the restrictions on speech were arguably incidental. In contrast, the Exclusions at issue in this case directly forbid Massachusetts' citizens from considering or adopting certain amendments simply because of the subject matter therein. This Court has long made this sort of content-based distinction subject to strict scrutiny under the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.") (citations omitted); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons

may speak . . . "); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Tinker v. Des Moines*, 393 U.S. 503, 513 (1969) (striking down content-based restriction of political speech). Under this Court's long-established hostility to content-based limitations on free speech and the *Meyer* Court's recognition that speech related to ballot initiatives warrants the highest protections of the First Amendment, it should be plain that the content-based Exclusions in this case *must* be subjected to the highest level of Constitutional scrutiny.

Furthermore, as petitioners discuss in their petition for certiorari, the First Circuit's decision in the instant case has created a three-way split among lower courts as to the level of scrutiny demanded by the First Amendment when a government uses content-based distinctions to restrict core political speech related to ballot initiatives. The Eleventh and Sixth Circuits and the Supreme Court of Maine have indicated that content-based restrictions on speech related to the initiative process would raise major First Amendment concerns. *See Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir. 1996) (strict scrutiny would be warranted where initiative regulations were content-based); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993) (limitations on ability to initiate legislation via initiative must be content-neutral); *Wyman v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993) (restrictions on initiative efforts subject to exacting scrutiny, content-based restriction held unconstitutional). The D.C. Circuit, on the other hand, determined in *Marijuana Policy Project v. United States*, 304 F.3d 82, 86 (D.C. Cir. 2002), that the First Amendment was not implicated even

by direct, content-based censorship of political speech related to the initiative process, thereby refusing to apply any degree of scrutiny whatsoever to the restrictions imposed in that case. And in this case, even though the First Circuit recognized that the First Amendment was implicated by Massachusetts' Exclusionary provisions it merely applied intermediate scrutiny. *See Wirzburger v. Galvin*, 412 F.3d 271, 276-77 (1st Cir. 2005) (despite acknowledgement that petitioners' core political speech was being restricted, court believed case required "lower level of scrutiny"). This Court should take this opportunity to resolve the confusion and reaffirm its holding in *Meyer*, that because the purely political speech related to ballot initiatives is at the very core of the First Amendment's protections, the Constitution requires that the highest level of scrutiny be applied to governmental efforts to impose content-based restrictions on speech related to those initiatives.

IV. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE PROPER APPLICATION OF THE FREE EXERCISE AND EQUAL PROTECTION CLAUSES TO STATE CONSTITUTIONAL PROVISIONS ADOPTED TO DISCRIMINATE AGAINST RELIGIOUS MINORITIES.

If Massachusetts had adopted its 1855 anti-aid amendment prohibiting provision of aid to sectarian schools because those schools were operated by and for African-Americans, this Court's precedents are clear: the enactment would be invalidated as a violation of the Equal Protection Clause.[12] Similarly, this Court would not hesitate

[12] While there may arguably be circumstances where religion in general or religious activities should be subjected to less than strict

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to strike down an enactment that made it more difficult to enact legislation benefiting African-Americans. In *Hunter v. Underwood*, 471 U.S. 222 (1985), this Court held unanimously that because a provision of the Alabama Constitution of 1901 that disenfranchised persons convicted of certain crimes had been adopted because it resulted in the disproportionate disenfranchisement of African-Americans, it violated the equal protection of the laws guaranteed by the Fourteenth Amendment. Its object was to discriminate against African-Americans, and its application had that effect. In this case, the anti-aid constitutional provisions at issue were adopted to deny public funds for Catholic schools and institutions, while continuing to fund Protestant public schools. Unless it is permissible under the Free Exercise and Equal Protection Clauses to single out one religion or sect for disfavored treatment, then the lower courts in this case should have invalidated these provisions as religiously discriminatory.

Although such blatant cases of religious discrimination have come before this Court only rarely, this Court has not hesitated to strike down the provisions involved. In the most recent of such cases, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court invalidated a city ordinance prohibiting the slaughter of animals under certain circumstances, an ordinance that was on its face religiously-neutral, finding

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scrutiny, surely where one religion and its adherents are the deliberate target of acts motivated by religious animus, the justification of strict scrutiny review as necessary to protect "discrete and insular minorities" is present. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Indeed, *Carolene Products* suggested that particular *religious* minorities, as well as national and racial minorities, should be the subject for "more searching scrutiny." *Id.*

that in fact the ordinance was adopted to prevent the ritual animal sacrifice that is part of the Santeria religion. The ordinance violated the First Amendment's guarantee that even Santerians can freely exercise their religion and are entitled to the equal protection of the laws.

Massachusetts' anti-aid provisions were no less religiously motivated, and were adopted deliberately to undercut Catholic institutions in pursuit of Protestant hegemony. The evidence supporting this is *incontestable* with respect to the 1855 enactment,[13] and the Court of Appeals below states that the defendants did not dispute it. *Wirzburger v. Galvin*, 412 F.3d 271, 285 (1st Cir. 2005) ("Plaintiffs present evidence that widespread anti-Catholic prejudice was a motivating factor behind passage of the original Anti-Aid Amendment in 1855, a fact which defendants do not dispute").[14] Instead the Court of Appeals looks

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[13] The Petition presents an excellent summary of the uncontroverted historical evidence that demonstrates that the original 1855 enactment was motivated by pervasive anti-Catholic animus, which needs no duplication here. This animus by the Protestant majority towards the Catholic minority did not magically dissipate in Massachusetts after 1855; if anything the increasing Catholic population appears to have exacerbated it as the minority's political power began to seriously threaten Protestant hegemony. See Jorgenson, *supra* n. 2, and Philip Hamburger, *Separation of Church and State* (2002).

[14] The Court of Appeals substantially understates what the historical record shows. Widespread anti-Catholic prejudice was far more than "a" motivating factor in adoption of the provision; it was plainly the primary motivating factor. See Jorgenson, *supra* n. 2; and Joseph Viteritti, "Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law," 21 *Harv. J.L. & Pub. Pol'y* 657 (1998). Massachusetts was the last state to abolish its established state religion of congregationalism, not doing so until 1833, only two decades before it passed the anti-aid amendment. Hamburger, *supra* n. 7, at 213. Anti-Catholic sentiment was rife in Massachusetts throughout the period leading up to the Civil War, periodically bursting into flame, literally in 1839 when a nativist mob incited by Boston Protestant clergymen

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to the changes made to the 1855 anti-aid provision by its 1917 amendment, which it describes as "largely overhauling it." *Wirzburger*, 412 F.3d at 285. That supposed "overhaul," which the Court of Appeals relies upon to ameliorate or dissipate the original discriminatory intent behind the provision, in fact *extended* its pernicious effects to encompass religious institutions in general, adding Catholic institutions such as hospitals, orphanages, and colleges to the Catholic schools previously excluded from state aid.[15] While the changes made to the provision retained all of its discriminatory impact on Catholic schools, the expansion to include institutions such as hospitals did allow some of those institutions to be compensated by government for services rendered, while preventing them from receiving grants-in-aid.[16]

Similarly, this court has several times invalidated legislation that made it more difficult for laws benefiting African-Americans to be passed. In *Hunter v. Erickson*,

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burned the Ursuline Convent and school to the ground. Jorgenson, *supra* n. 2, at 29.

[15] In *Hunter v. Underwood*, Alabama argued that after the disenfranchisement provision was added to the state constitution, various events occurring after enactment had legitimated the provision by narrowing its scope through the elimination of various crimes as disqualification from voting. This Court rejected that approach as insufficient to remove the taint, since it did not suffice to show the provision would have been enacted without the discriminatory motivation. 471 U.S. at 233. In the case below, the Court of Appeals relied on the *expansion* of a discriminatory provision's discriminatory impact to find a dissipation of the original, concededly discriminatory intent.

[16] It may well be that here lies the explanation for why many of the Catholic members of the 1917-18 constitutional convention were induced to vote for adoption of the measure, a fact made much of by the Court of Appeals. *Wirzburger*, 412 F.3d at 285. If you are going to lose anyway, you may vote for a version that at least throws a scrap your way.

393 U.S. 385, 387-91 (1969), this Court invalidated a provision of the Akron, Ohio city charter that added the extra hoop of requiring voter approval for real estate ordinances regulating transactions "on the basis of race, color, religion, national origin or ancestry." The law made it more difficult to pass laws prohibiting racial (and religious!) discrimination and was struck down for doing so. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), this Court likewise invalidated a Washington initiative that prohibited forced busing of schoolchildren, recognizing that the law was intended to hinder efforts to integrate African-Americans in the Seattle public schools.

In the case below, the pattern is stronger by far than in any of these cases involving race. The original enactment had the undeniable effect of discriminating against Catholic schools, and its amendment in 1917 had the undeniable effect of extending that discrimination to other Catholic institutions. In this context, the virtually simultaneous exclusion of the newly expanded discriminatory provision from the newly created initiative and referendum process establishing a procedurally easier means of amending constitutional provisions could not be more clearly an effort to freeze the discriminatory provision in place.[17]

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[17] The Court of Appeals reasoned that unlike the exclusions in *Erickson* and *Seattle School District No. 1*, the Massachusetts exclusions do not "evince[ ] a clear, solely detrimental effect on a suspect class." *Wirzburger*, 412 F.3d at 284. This analysis borders on sophistry. The Court of Appeals believes that religious minorities benefit from the exclusion's preventing amendment of the Massachusetts free exercise clause, which is also contained in the anti-aid provision. *Id.* But at the time it was enacted what good was the Massachusetts free exercise clause, when it was already compromised by the next clauses that reserved all public funding for nondenominationally Protestant institutions? And what good is it now when direct aid to all religious

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The Court of Appeals asserts that "[n]o evidence has been offered that the exclusion [of the anti-aid amendment from the initiative and referendum process] was motivated by the same Anti-Catholic animus that impelled passage of the original Anti-Aid Amendment." *Wirzburger*, 412 F.3d at 285. The Court then accuses the plaintiffs of seeking to mix and match the intent behind the several amendments. In doing so, the Court turns a blind eye both to the evidence the plaintiffs offered concerning the discriminatory motivation behind the extension of the anti-aid provision and to the effects of the extension, which is patently to expand the discriminatory effects of the original enactment into areas other than elementary and secondary education. Given that the convention had just compounded the damage done to Catholic interests, the fact the convention then proceeds to make it substantially more difficult to ever reverse the damage strongly suggests that a single motivation underlies both acts. In the absence of some evidence of a contrary motivation, the convention can be safely presumed to have acted from the same motivation in enacting such closely related provisions.[18]

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institutions is precluded by the Federal Establishment Clause? Today, all the exclusion protects from easier amendment are the anti-aid interpretations of the Massachusetts Supreme Court that go far beyond the Establishment Clause in prohibiting nondiscriminatory aid to individuals who might freely select religious providers for their children's elementary and secondary education.

[18] In *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), this Court held that a finding of intentional discrimination with respect to segregation in one portion of a school district created a presumption that segregation in other parts of the district was not adventitious and justified shifting the burden of proving a non-discriminatory motivation to the defendants. As this Court said in *Keyes*, "[t]his is merely an application of the well-settled principle that 'the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful in

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Suppose that in *Hunter v. Underwood* a later Alabama constitutional convention had added additional criminal offenses to the list of offenses disqualifying felons from voting and that these additional offenses were known to add to the discriminatory impact on African-Americans. Suppose further that the convention also adopted a new referendum and initiative provision that contained a special exclusion exempting the amended voting disqualification article from the scope of the process. This Court would not hesitate for a second to impute to the new convention an ongoing racial motivation and shift to the state the burden of proving that a non-invidious motivation underlay the new provisions. The same result should apply here, where the only difference is that a disfavored religious minority was the object of such provisions.

The Court of Appeals paid lip service to the proper standard but failed utterly in its application of it. It stated that "[c]ertainly any form of invidious discrimination because of religion is forbidden," *Wirzburger*, 412 F.3d at 284, but held that the exclusion did not evince a clear, solely detrimental effect on a suspect class and that discriminatory intent had not been shown. Rather the First Circuit presumes that Massachusetts was pursuing the same basic policies as those underlying the federal Religion Clauses, which mandate that any system of public schools be religiously-neutral. The truth of the matter, however is far different, as one scholar has concluded:

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reducing the possibility that the act in question was done with innocent intent.'" *Keyes*, 413 U.S. at 207 (*quoting* 2 J. Wigmore, *Evidence* 200 (3rd ed. 1940)). The Court of Appeals should have applied a similar analysis here, requiring the state to prove a non-discriminatory motive for putting the expanded Anti-Catholic anti-aid provision off-limits to the initiative and referendum process.

> American public education is pervaded by the myth that prohibition of public aid to non-public schools is a policy of constitutional origin. In fact, that policy was well established at the state level by 1860, a good century before the U.S. Supreme Court gave it constitutional status. As originally established by the leaders of the Common School Movement, the policy was not justified by any appeal to the abstract principle of separation of church and state. The argument of the common school leaders was simple and blunt: the growth of Catholicism was a menace to republican institutions and must be curbed. Catholic schools, as a contributing factor to the growth of the Church, must also be restricted and, if possible, suppressed.[19]

Put into the proper context of public schools that were unquestionably Protestant in orientation, Massachusetts' constitutional provisions precluding funding for Catholic schools and institutions and subsequently making modification or removal of that policy more difficult than other provisions cannot be regarded as benign. The anti-aid provisions did not establish the modern dichotomy between publicly-funded secular public schools and privately-funded religious private schools. Rather, they established a Protestant monopoly on public school funding for public Protestant schools, and eliminated the possibility of funding of comparable public schools for Catholics.[20] Not content with depriving Catholic schools of

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[19] Jorgenson, *supra* n. 2, at 216.

[20] Beginning in 1835, the town school system in Lowell, Massachusetts incorporated two Catholic schools into the system. Catholics were appointed teachers in these schools, and no textbooks or exercises offensive to Catholics were used. By 1840, the system included five primary and one secondary school for Catholics. Jorgenson, *supra* n. 2,

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public funding, Protestants joined with various nativist organizations over the subsequent decades in efforts to force the closure of Catholic schools, even if that meant that the few secular or Protestant private schools were closed, too. Such efforts in Massachusetts were part of a nationwide assault on Catholic schools, which failed at the national level in 1925, shortly after the Massachusetts constitutional convention of 1917-18, when this Court ruled in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), that parents had the right to send their children to private schools and that Oregon did not have the right to force all children to attend public schools.

It is only in recent times, with this Court's application of the Federal Constitution's Religion Clauses to the states and the subsequent interpretation of those Clauses to mandate religious neutrality in the public schools, that the religious favoritism towards Protestantism built into the public schools has been eradicated. That favoritism continued long after the adoption of the anti-aid amendment in 1855 and its extension in the convention of 1917-18. Throughout that time those provisions operated as they were originally intended to do so, to prefer Protestant interests over those of Catholics. It is impossible to know whether Massachusetts would reenact these provisions today were they to be invalidated based upon the original discriminatory motivation, but their "shameful pedigree"

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at 73-74. Anti-Catholic agitation led to the cancellation of the cooperative arrangement, and the Catholics were forced to choose between attending inhospitable Protestant public schools or privately-funded Catholic schools. Catholic desire for comparable public funding of their schools led to passage of the anti-aid provision making it unconstitutional to accede to the Catholic requests.

cannot be ignored.[21] The exclusion of students in sectarian schools from otherwise permissible aid programs, "a doctrine born of bigotry," should indeed "be buried now."[22]

V. CONCLUSION

Amicus respectfully urges this Court to grant the Petitioners' request for a grant of certiorari.

Respectfully submitted,

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[21] Obviously much of the effect of these provisions will remain as a result of the application of the Federal Religion Clauses to the states. Direct funding of religious schools will continue to be prohibited by the Establishment Clause. What would not remain, however, is the effect the interpretation of these provisions has on programs that pass muster under the Religion Clauses, but in which the Massachusetts Supreme Court has found a violation, such as textbook loan programs and tax deductions for educational expenses. See n. 1, *supra*, and the cases cited therein. In particular, the initiative petition submitted by the Plaintiffs below to permit the Commonwealth to provide loans, grants, or tax benefits to *students* attending private schools, including religious ones, would now be permitted.

[22] *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality op. of Thomas, J.).

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No. 05-519

IN THE

Supreme Court of the United States

MICHAEL WIRZBURGER, *ET AL.*,
Petitioners,

v.

WILLIAM F. GALVIN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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ARGUMENT

Massachusetts argues that review is inappropriate because the discriminatory structure established by the Anti-Aid Amendment and its entrenching Exclusions from ballot initiative is unique. But its component parts are not. The forerunners and successors of the nativist federal Blaine Amendment exist in over 30 state constitutions, and courts have struggled to reconcile them with federal prohibitions against religious discrimination. And there is a widening split over the level of First Amendment scrutiny applied to content-based carve-outs from ballot initiatives.

Indeed, to the extent the Massachusetts regime is unique at all, it is precisely those features that make review by this Court necessary. These provisions are self-

entrenching, subverting the political process so thoroughly that the ordinary avenues of democratic self-correction are closed off. It is in precisely these circumstances, where the citizens of Massachusetts have no recourse but to the federal courts, that their intervention is most needed.

1. With regard to the first question in the Petition—censorship of political expression in state initiative processes—Massachusetts admits that the lower courts lack a uniform standard for resolving this issue, conceding that at least "three circuits" have applied "different reasoning." (Br. Opp. 13). Nonetheless, Massachusetts seeks to whitewash this lower court disarray by asserting that there have been "consistent results" in the various cases. The "consistent results" Massachusetts discovers in the holdings of all three circuits and the Maine Supreme Judicial Court is the unremarkable idea "that the government may limit the subjects that can be addressed in citizen initiatives without violating the First Amendment." (Br. Opp. 11). But this is beside the point. Petitioners have never argued that government may not place *any* limits on the subjects addressed in a citizen initiative.[1] Rather, Petitioners have argued that those limits must be subject to strict scrutiny. As Massachusetts acknowledges, the Sixth Circuit, the Eleventh Circuit, and the Maine Supreme Judicial Court all apply strict scrutiny to this form of content discrimination. The First Circuit applied intermediate scrutiny in this case. And the D.C. Circuit applies no scrutiny.[2] The courts have

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[1] This is contrary to Massachusetts' misleading characterization of "petitioners' basic proposition." (Br. Opp. 14) (quoting First Circuit's opinion rather than any argument advanced by Petitioners).

[2] Massachusetts points out that the circuit split is even wider than described in the Petition, as the Tenth Circuit also applies no scrutiny to this form of content discrimination. *See Skrzypczak* v. *Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996).

thus split over *applicable standards*, not "results" in individual cases.

This Court routinely grants certiorari to ensure that lower courts apply consistent standards. *See, e.g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 510 (2002) (certiorari granted to "resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases"). "Consistent results"—especially when very different standards are applied to very different facts—are simply not relevant. Massachusetts admits the split over the proper standard and the Court should take this chance to resolve it.

2. Massachusetts attempts to distinguish opinions by the Eleventh Circuit, Sixth Circuit, and the Maine Supreme Judicial Court[3] from this one by arguing that the standard they announced—strict scrutiny—was not actually applied in those cases. (Br. Opp. 16-18). But "the principle of *stare decisis* directs [courts] to adhere not only to the holdings of [their] prior cases, but also to their explications of the governing rules of law." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996). All three courts situated the particular facts before them within a framework of law that explicitly requires strict scrutiny for content limitations on citizen initiatives. It is therefore of no moment that the courts in two of those cases determined that the facts fit into a different part of the acknowledged framework.

And in the third case—*Wyman*—the Maine Supreme Judicial Court *explicitly* stated that it was

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[3] *Biddulph* v. *Mortham*, 89 F.3d 1491 (11th Cir. 1996), *Delgado* v. *Smith*, 861 F.2d 1489 (11th Cir. 1988), *Taxpayers United for Assessment Cuts* v. *Austin*, 994 F.2d 291 (6th Cir. 1993), and *Wyman* v. *Secretary of State*, 625 A.2d 307 (Maine 1993)

applying the First Amendment to content discrimination: "[the Secretary's] refusal to furnish the petition form *based on the content* of the proposed legislation impermissibly violated Wyman's rights protected by the first amendment." *Wyman*, 625 A.2d at 311 (emphasis added). Massachusetts' claim that *Wyman* "did not address subject matter restrictions in an initiative process" is therefore disingenuous at best. (Br. Opp. 17). Moreover, *Wyman* was also similar to this case because the court held that the government could not cut off debate about a contentious social issue—civil rights protections for homosexuals—before it even started. *Wyman* at 311.

3. The central issue posed by Petitioners' second question is under what circumstances facial neutrality is insufficient to satisfy the constraints of the Free Exercise[4] and Equal Protection clauses. Rather than grappling with the issue presented, Massachusetts simply proclaims that facial neutrality is sufficient to pass muster under the neutrality analysis required by *Hunter* v. *Erickson*,[5] *Washington* v. *Seattle School District No. 1*,[6] and *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*.[7] (Br. Opp. 20-21). Massachusetts is mistaken. The statute in *Hunter* was just as facially neutral as the Anti-Aid Amendment and Exclusions are. Nonetheless, the *Hunter* Court sensibly interpreted the statute in light of its context and held that the "law's impact falls on the minority." 393 U.S. at 391. Similarly, the Court in *Washington* used the well-known historical context to determine whether the facially neutral regulations were meant to "interfere only

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[4] Massachusetts is wrong to state (Br. Opp. 19 n. 3) that Petitioners have not advanced a Free Exercise claim both here and in the First Circuit. (Pet. 19).

[5] 393 U.S. 385 (1969).

[6] 458 U.S. 457 (1982).

[7] 508 U.S. 520 (1993).

with desegregative busing." 458 U.S. at 471. Likewise, in *Lukumi*, this Court held that "[f]acial neutrality is not determinative," 508 U.S. at 535, and looked to the actual effect of the law, its lack of narrow tailoring, and the intent of the drafters in striking down a law based on lack of neutrality.

Here, Massachusetts has no response for Petitioners' many examples detailing how both the Exclusions' impact falls on religious minorities seeking to achieve beneficial legislation in the democratic process. (Pet. 23-26, 28-29, & n.14). Moreover, Massachusetts would have this Court ignore the historical context of the 1917-1918 Convention. No one disputes the long history of nativism in Massachusetts, or that anti-Catholic feeling was running high during World War I. Nor does anyone dispute that the vast majority of the private schools in Massachusetts in 1917 were Catholic schools. In short, "[n]o one suggests, and on this record it cannot be maintained, that [state] officials had in mind a religion other than [Catholicism]." *Lukumi*, 508 U.S. at 535. To assume from this historical context that the Convention's enactments were not meant to discriminate against Catholics is to ignore history.

Massachusetts compounds its error by mischaracterizing the historical record of anti-Catholic bias motivating both the Anti-Aid Amendment and the Exclusions during World War I. Massachusetts implies that Petitioners have relied on only a single remark by one member of the 1917-1918 Convention for the anti-Catholic nature of the Exclusions. (Br. Opp. 23 n. 16). But as Massachusetts well knows, Petitioners provided to both the trial court and the First Circuit a historian's—as yet uncontroverted—expert opinion that the Anti-Aid Amendment and Exclusions were motivated by anti-

Catholic bias. (Pet. App. 82a, 87a). Petitioners also provided other documentary evidence, such as newspaper reports from the time and history books discussing the period, all detailing the anti-Catholic nature of the Anti-Aid Amendment.

Both the trial court and the First Circuit glided over this disputed material fact issue, the First Circuit relying on the fact that several of the Catholic delegates at the Constitutional Convention voted for the Anti-Aid Amendment and the Exclusions. (Pet. App. 23a). It is more than passing strange that a court would see fit to use a Catholic public servant as a proxy for all Catholics or Catholic beliefs. That kind of identity politics is something this Court generally shies away from.

But even more disturbing is that the First Circuit's analysis is missing any context. As Petitioners demonstrated below, those Catholic delegates were not voting in a vacuum. To the contrary, they were fighting a political rearguard action to stop an even more virulently anti-Catholic version of the Anti-Aid Amendment from being enacted.

Beginning in 1900, nativists in the legislature each year proposed an "Anti-Sectarian Amendment" that would have expanded the Anti-Aid Amendment to prohibit funding of *any* institution under sectarian (*i.e.*, Catholic) control.[8] The 1917-18 amendments to the Anti-Aid Amendment grew out of these Anti-Sectarian Amendments, which were introduced during a period of resurgence of organized Anti-Catholicism, and were

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[8] *See* I DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917-1918 ("*Debates*") at 182.

sponsored by secret, religiously bigoted patriotic societies.[9] "[T]he underlying agenda [of the Constitutional Convention] continued to be the creation of uniformity of belief." (Pet. App. 82a). The Convention's consideration of the anti-sectarian amendment was also a reaction to growing Catholic power. As one delegate stated after election of a Catholic governor, "there were certain forces in the State that felt his election was a great menace, and so that helped to the securing of a following for this anti-sectarian amendment." *Debates* at 183.

The delegates who supported the new Anti-Aid Amendment saw themselves as completing the work left unfinished by their Know-Nothing predecessors in the 1850's.[10] To them, the 1853 Convention "lacked both in courage and in vision[.] ... They did not see how important it was to clear up this whole question, and they dealt only with public schools, leaving higher educational and charitable institutions entirely out of the question."[11] Like the Know-Nothings, they sought to preserve the "Americanizing" influence of public schools. *See Debates* at 71.

In addition, an alternative measure introduced by Delegate Anderson was a more virulent anti-sectarian amendment directed at Catholic institutions, targeting only appropriations to institutions under "sectarian or

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[9] *See* ROBERT H. LORD, *ET AL.*, III HISTORY OF THE ARCHDIOCESE OF BOSTON 583 (1944); JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS: THE RISE AND FALL OF A PEOPLE'S MOVEMENT 102 (1990).

[10] JOHN HIGHAM, STRANGERS IN THE LAND: PATTERN OF AMERICAN NATIVISM, 1860-1925 at 62-63, 80-87 (1998).

[11] *See id.* at 159-160.

ecclesiastical control."[12] Anderson's measure "was supposed to embody the views of those who were especially desirous of preventing appropriations of public moneys to Roman Catholic institutions." *Id.* The measure that was adopted (and later enacted), which bars using public money to benefit any private institutions, was characterized by some as a compromise measure. However, the Archdiocese of Boston vigorously denounced this "compromise" as a "vicious faction ... impos[ing] its will upon the less violent adherents of the sect of anti-Catholicity." *An Unworthy Compromise*, THE PILOT, Sep. 22, 1917 at 1.

Catholics were forced to accept this so-called "compromise" under threat of having Mr. Anderson's anti-sectarian amendment aimed at the Catholic church imposed on them:

> Mr. Anderson[], who introduced the anti-sectarian resolution, said in the course of his argument that there were a hundred thousand minute-men who stood to advocate and advance his amendment. He told us that if we did not take this amendment he would give us the anti-sectarian amendment.

Debates at 209. This "compromise" measure did nothing to cut back on the discrimination inherent in funding public schools that had a mainstream religious bent, but continued to deny funding to private "denominational" religious schools. *Id.* at 71. In short, in light of this history, Petitioners' expert historian has concluded that "[t]he action of the Massachusetts Constitutional Convention in 1917-18 in adopting the 'Anti-Aid Amendment' was

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[12] RAYMOND L. BRIDGMAN, THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1917 at 23 (1923).

clearly motivated by a prejudicial understanding of the place of ethnic and religious minorities in order to impose a state-endorsed orthodoxy of beliefs and loyalties." (Pet. App. 87a).

In sum, the unrefuted evidence of discriminatory impact and discriminatory intent behind the Anti-Aid Amendment and its Exclusions provide this Court with an appropriate opportunity to clarify its neutrality analysis under the Free Exercise and Equal Protection Clauses.

4. Massachusetts also claims that its constitution is so unique that it does not merit this Court's attention. (Br. Opp. 19). This claim contradicts Massachusetts' own assertion before the First Circuit that "[o]f the twenty-three other states that have state-wide initiative processes, eleven have subject matter restrictions." (Appellees' Br. 10 n. 3). It also contradicts the fact that the number of proposed initiatives is increasing, as are attempts to limit initiative content. *See, e.g.*, Steve C. Briggs, *Colorado's Constitutional Contradictions*, DENVER POST, Apr. 6, 2003, at E01 (advocating limits on voter initiatives dealing with controversial social issues). And it ignores the fact that ballot initiatives occur at all levels of government and can be limited by state constitutions, statutes, municipal charters like the one in *Hunter*, and municipal ordinances. The Court needs no oracle to know that this issue will come before it again. This case provides it with an appropriate vehicle for setting the ground rules for future attempts to limit access to the democratic process in violation of the guarantees of the First and Fourteenth Amendments.